IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

FRANK PARKER and GEORGE MORAN,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below

The opinion in the Supreme Court of Illinois is reported in 378 Ill. 461, 38 N. E. 760, copied in the record herewith at page 8 and appended hereto (p. 21). The opinion of the Appellate Court of Illinois is reported in 310 Ill. App. 307, 34 N. E. 110, and also appended hereto (p. 32). The trial court rendered no opinion, nor was any opinion filed by the Supreme Court of Illinois when the writ of error was originally transferred from that court to the Appellate Court (R. 2).

II.

Jurisdiction

The judgment was entered in the trial court (the Criminal Court of Cook County, Illinois), but a supersedeas

was allowed by the Appellate Court of Illinois and, as appears from the record herein, the Supreme Court of Illinois affirmed the judgment on November 24, 1941. Under the rules that judgment was not made final until a petition for rehearing was denied on January 15, 1942. The Supreme Court of Illinois has the record, a certified transcript of which is filed herewith.

We respectfully submit that this Honorable Court has decided that if a petition for rehearing is entertained by the higher court of a state, its judgment does not become final until the petition for rehearing is denied (*Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, 23-25; *Citizens' Bank of Michigan City, Ind.* v. *Opperman*, 249 U. S. 448, 450; *Ohio Public Service Co.* v. *State of Ohio ex rel. Fritz*, 275 U. S. 12; *Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164; *Iowa-DesMoines Nat. Bank* v. *Stewart*, 283 U. S. 813; *Iowa-DesMoines Nat. Bank* v. *Bennett*, 284 U. S. 239).

Where the court of last resort, as the Illinois Supreme Court in the case at bar, affirms a final judgment of an inferior state court, the judgment of the highest court is the one reviewable (*Lessieur* v. *Price*, 12 How. 59, 72, 13 L. Ed. 893; *Fox Film Corporation* v. *Doyal*, 286 U. S. 123, 126, 52 S. Ct. 546, 76 L. Ed. 1010).

In the case at bar, the federal question was specifically raised during the trial (Abst. 250) in the motion for new trial (Abst. 278) in the trial court and was reasserted in the assignment of errors made in the State Supreme Court (Abst. 281), and therefore we respectfully submit that the federal question was timely and properly raised, even though the Illinois Supreme Court did not expressly refer to our respectful contention as a federal question (*Chicago, Burlington & Quincy R. Co.* v. *City of Chicago*, 166 U. S. 226, 231, 232; *Johnson* v. *New York Life Ins.*

Co., 187 U. S. 491, 495; *International Harvester Co.* v. *Missouri ex inf. Attorney General*, 234 U. S. 199, 206, 207; *Erie Railroad Co.* v. *Purdy*, 185 U. S. 148, 154).

We respectfully submit, the failure of the State court to pass upon our contention as a federal question is not conclusive upon this Honorable Court (*Chicago, Burlington & Quincy Ry.* v. *Illinois ex rel. Drainage Com'rs*, 200 U. S. 561, 580, 581; *West Chicago St. Railroad Co.* v. *Illinois ex rel. City of Chicago*, 201 U. S. 506, 519, 520; *Wood* v. *Chesborough*, 228 U. S. 672, 676-680). This Honorable Court will determine the inquiry for itself (*Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; *Broad River Power Co.* v. *South Carolina ex rel. Daniel*, 281 U. S. 537, 540; *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282; *Patterson* v. *State of Alabama*, 294 U. S. 600, 602; *Ward* v. *Board of County Com'rs of Love County, Okla.*, 253 U. S. 17, 22; *Davis* v. *Wechsler*, 263 U. S. 22, 24, 25). In other words, our contention as shown by the record (Abst. 250) was submitted to the trial court as a federal question and was ruled on there against these petitioners, and the point was properly reserved for review as a federal question. The highest court of the state affirmed the lower court after we submitted our contention as a federal question but the high state court did not designate our contention as a federal question.

We respectfully submit that we are not requesting this Honorable Court to re-examine facts tried by the jury. The trial court refused to permit the jury to hear the facts on the subject of former jeopardy, but as is shown by the record (Abst. 252) the trial court passed upon the question as one of law. Therefore our offered facts must be conceded. Our respectful contentions concern the legal effect and sufficiency of the facts so conceded and the theory upon which the case was submitted below and are

questions of law for this Honorable Court (*Kaufman* v. *Tredway,* 195 U. S. 271, 274; *Dower* v. *Richards,* 151 U. S. 658, 667; *Graham* v. *Gill,* 223 U. S. 643, 645; *St. Louis, San Francisco & T. Ry. Co.* v. *Seale,* 229 U. S. 156, 161; *St. Louis, I. M. & S. Ry. Co.* v. *McWhirter,* 229 U. S. 265, 277; *Chicago, M. & St. P. Ry. Co.* v. *Coogan,* 271 U. S. 472, 474; *Seaboard Air Line Ry.* v. *Padgett,* 236 U. S. 668, 673; *Union Pacific R. Co.* v. *Huxoll,* 245 U. S. 535, 538; *Baltimore & Ohio Southwestern R. Co.* v. *Burtch,* 263 U. S. 540, 543; *Brinkmeier* v. *Missouri Pac. R. Co.,* 224 U. S. 268, 270; *Chicago, Burlington & Quincy R. Co.* v. *Chicago,* 166 U. S. 226, 242; *Missouri K. & T. Ry. Co.* v. *Haber,* 169 U. S. 613, 639; *Smiley* v. *Kansas,* 196 U. S. 447, 454; *St. Louis, I. M. & S. Ry. Co.* v. *McWhirter,* 229 U. S. 265, 280; *Great Northern Ry. Co.* v. *Donaldson,* 246 U. S. 121, 124; *Southern Railway Co.* v. *Lunsford,* 297 U. S. 398; *Mammoth Mining Co.* v. *Grand Central Mining Co.,* 213 U. S. 72, 73).

Our respectful claim is that the highest court of our State has refused to recognize the rights of petitioners as citizens of the United States which claimed protection of the federal constitution was properly raised. As your Honors know, the use of certiorari to correct error is not infrequent in criminal cases.

So, in the case at bar, there can be no question but what there has been:

(1) A final judgment;

(2) The decision sought to be reviewed is by the highest court of the state in which decision could be had;

(3) The judgment was rendered in a "suit" involving a "case" or "controversy";

(4) The case presents a substantial federal question;

(5) The federal question sought to be reviewed was properly raised and preserved in the state courts; and

(6) The decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment.

So, as your Honors will perceive, the question in the case at bar narrows itself down to whether or not a substantial federal question is submitted, which question, of course, is for decision upon the entire record in the light of the decisions of this Honorable Court and in the exercise of discretion and the supervisory power of this Honorable Court.

We respectfully submit that the inquiry whether a substantial Federal question is involved in the case at bar is not dependent upon whether petitioners are guilty or innocent, as they should have protection against double jeopardy in either event. We respectfully submit, however, that if jurisdiction be taken here we shall be able to show from the record that petitioners were not proven to be guilty by credible evidence and that the errors committed below brought about an improper and unjust result.

Statement of the Case

Reference is respectfully made to the "Summary Statement of the Matter Involved" in our petition (herein p. 1). Also to the opinion of the Appellate Court herein (p. 32) and the opinion of the Supreme Court of Illinois herein (p. 21) and to the record for the facts of the entire case.

Errors to Be Urged

Reference is respectfully made to our petition under a similar heading (herein p. 3).

Questions Presented

The trial court refused to permit petitioners to show that they had been tried before a jury for the same offense and acquitted. It was urged in the trial court and in the upper courts that the trial court erred and thereby deprived petitioners of due process of law as guaranteed by the XIV amendment to the constitution of the United States.

The right of petitioners to protection as against double jeopardy is well established, so the real question narrows itself down to the following:

Petitioners were acquitted on the charge of forgery and uttering. They were later placed upon trial for conspiracy to forge and utter the same papers. It appears that the evidence was the same in both cases and the theory of the prosecution in the first case was based upon the existence of the same conspiracy alleged in both cases. The question presented is, does this constitute the same offense?

Were petitioners afforded a fair trial and due process of law?

Was the evidence sufficient?

Constitutional Provisions Involved

The XIV amendment to the constitution of the United States provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

I.

No person shall be twice put in jeopardy for the same offense.

Constitution of Illinois 1870, Art. 2, Sec. 10.

II.

A violation of this right which is fundamental is a denial of due process of law as guaranteed by the XIV amendment to the constitution of the United States.

Ex parte Ulrich, 42 Fed. 587.

III.

When the question of former jeopardy is presented at a second trial the question of identity of offenses can be inquired into by an inspection not only of the former judgment, but of the pleadings and the evidence and all matters which may disclose the real situation.

Harding Co. v. *Harding,* 352 Ill. 417.
Neil v. *Chavers,* 348 Ill. 326.
Petition of Blacklidge, 359 Ill. 482.
Hoffman v. *Hoffman,* 330 Ill. 413.
Smith v. *Auld,* 31 Kan. 262, 1 Pac. 626, 628.
Davis v. *People,* 22 Colo. 1, 43 Pac. 122.

IV.

In Illinois an accessory can only be indicted and punished as a principal. The judgment of conviction upon an indictment which fails to charge the defendant with the crime as principal will be arrested on motion.

Fixmer v. *People,* 153 Ill. 123.
People v. *Trumbley,* 252 Ill. 29, 35.
Baxter v. *People,* 3 Gilm. 368.
Coates v. *People,* 72 Ill. 303.
Usselton v. *People,* 149 Ill. 612.

V.

Under their pleas of not guilty the defendants were entitled to prove any defense to the charge including that of former jeopardy and acquittal.

People v. *Greenspawn,* 346 Ill. 484, 486.

VI.

If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.

Ex parte Lange, 85 U. S. (18 Wall. 205), 163, 168.
People v. *Miner,* 144 Ill. 308.

SUMMARY OF ARGUMENT.

A.

Under the constitution and laws of Illinois no person should be twice put in jeopardy.

Petitioners were previously acquitted by a jury of the same offense.

It is proper under the Illinois practice to show a former acquittal under a plea of not guilty.

An offer to prove a former acquittal was refused by the trial court. Petitioners claimed at the trial that such refusal denied them due process of law as guaranteed by the Fourteenth Amendment to the constitution of the United States. The ruling of the trial court was assigned as error in the decisions of the federal question in the court of review without effect.

It is proper to look to the entire record in determining the merits of the claim of former jeopardy.

The Fourteenth Amendment is a limitation upon the powers of the state governments.

Due process of law as guaranteed by the Fourteenth Amendment requires that no man can be twice lawfully punished for the same offense.

The point was properly preserved by petitioners.

The power of the state to regulate its local problems is subject to the federal constitution in the matter of double jeopardy.

The adoption of a rule or procedure in the state court cannot foreclose inquiry in this Honorable Court as to

whether in a given case the application of the rule works deprivation of a prisoner's liberty without due process of law.

A right or immunity set up and claimed under the constitution of the United States may be denied as well as evading a direct decision thereon as by positive action.

B.

The evidence is insufficient to support the verdict.

C.

There can be no guilty accessory without a guilty principal.

D.

The trial court erred in rulings concerning evidence, placed undue limitation upon the defense in cross-examination and erred in the matter of giving and refusing instructions.

E.

Conclusion.

ARGUMENT.

The constitution of Illinois provides (Constitution of 1870, Art. 2, sec. 10):

> "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

It is fundamental that to violate this provision is a denial of due process of law as guaranteed by the state constitution and the XIV amendment to the constitution of the United States. We realize that your Honors are not particularly concerned in the state constitution or its construction, but we wish respectfully to commence with the fundamental principle that it is improper and illegal to twice put any defendant in jeopardy. As appears from the record (Abst. 250), petitioners were previously acquitted of the substantive offense and then placed upon trial for the second time in the case at bar for conspiracy to commit the substantive offense. Under the law and the practice in the State of Illinois, it is proper to introduce evidence of former jeopardy under the general issue (*People* v. *Greenspawn*, 346 Ill. 484, 486). Such an offer was made in the case at bar and refused. If any dispute should arise on the facts (such as to identity of parties) it would be proper to submit such disputed facts to the jury under proper instructions. But no dispute as to the facts arose. The trial court held, as a matter of law, that the former acquittal did not bar the present action. The upper courts affirmed this view. We respectfully submit that error was committed in a substantial and important

matter. It is our respectful contention that the trial court erred and should have allowed the proof and should have held that the charge in the previous case and in the case at bar are the same. We understand that ordinarily conspiracy and the substantive offense alleged to be the object of the conspiracy are regarded as separate offenses as held in *People* v. *Darr*, 255 Ill. 456, 462, but we respectfully contend in the case at bar that the first and second cases were alike.

The courts seem to be in agreement to the effect that when the question of former jeopardy is presented at a second trial the bothersome question of identity of offenses can be inquired into by an inspection not only of the former judgment, but of the pleadings and the evidence and all matters which may disclose the real situation (*Harding Co.* v. *Harding*, 352 Ill. 417; *Neil* v. *Chavers*, 348 Ill. 326; *Petition of Blacklidge*, 359 Ill. 482; *Hoffman* v. *Hoffman*, 330 Ill. 413; *Smith* v. *Auld*, 31 Kan. 262, 1 Pac. 626, 628).

The case of *Davis* v. *People*, 22 Colo. 1, 43 Pac. 122, illustrates our respectful contention. Two defendants were placed upon trial for robbery and pleaded former jeopardy on the ground that there was a former trial wherein the same defendants were charged with conspiracy to commit the same robbery. The defendants were a man and a woman. The court announced the general rule that conspiracy to commit an offense and the commission of the offense are two separate offenses, and a prosecution in one does not generally bar the other. But upon examining the plea and that which was said by counsel below, it appeared that the man was prosecuted in the former case (wherein he was acquitted) on the theory that he was an accessory not present at the

commission of the crime (although the indictment in the former case charged him with being a principal, as did the second indictment). So the Colorado court concluded that there was necessarily a conspiracy in both the subsequent and the present offense and that it was error to overrule the plea. On the other hand, the woman, who had been convicted in the former trial, was held to be in a different position, and there was no error in overruling her plea for the reason that she was a principal, and it was not necessary to prove a conspiracy as against her in the case then under consideration.

Another case which comes close to the problem presented here is that of *State* v. *Parmenter*, decided by the Montana Supreme Court, 116 P. (2d) 879. It should be born in mind that in Illinois the prosecution is permitted to prove the existence of a conspiracy in order to establish guilt of a substantive offense, even where no conspiracy is charged in the indictment (*Spies* v. *People*, 122 Ill. 9). In the *Parmenter* case two embezzlement cases were involved. The prosecutor was able to point to what he claimed to be differences in the two informations. The Supreme Court decided in favor of the defendant on the broad ground that the two cases were alike. We quote:

> "It may be conceded that the state might have elected to treat any part of the embezzlement as a separate crime, but the state did not do so in this case. In both informations the crime was charged as one continuous offense as was done in the case of *State* v. *Kurth*, 105 Mont. 260, 72 P. (2d) 687."

We are not overlooking the many cases holding that two or more distinct offenses may arise out of the same transaction. In such cases there is no double jeopardy (*United States* v. *Adams*, 281 U. S. 202; *People* v. *Kidd*,

357 Ill. 133). Our point is that a single conspiracy cannot be split up for purpose of prosecution (*United States* v. *Owen*, 21 F. (2d) 868). We respectfully contend that the State courts missed our point. That when we offered to show that the two cases were alike, that they were based upon the same evidence, that petitioners had in fact been in jeopardy for the same offense.

Permit us to compare the two cases, the former and the present. The parties are the same and the subject matter and the evidence is the same (Abst. 251). The only disputed question is that of identity of offenses. It is our respectful contention that the offenses are the same. It will be noted that at the trial these petitioners objected as follows (Abst. 251):

> "In overruling the objection, your Honor is violating the right guaranteed them by the constitution of the State of Illinois and the United States relative to former jeopardy. That is no person should be placed in jeopardy more than once for the same offense."

It will also be noted that these points were preserved and assigned as error. We again quote from the record (Abst. 281):

> "Each one of the errors committed by the court deprived the defendants of due process of law as guaranteed by the XIV Amendment to the Constitution of the United States and the Bill of Rights in the Constitution of Illinois."

The constitution of Illinois (constitution of 1870) provides, among other things, as follows:

> "No person shall be deprived of life, liberty or property, without due process of law."

And:

> "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

We respectfully represent that to place a defendant twice in jeopardy violates the constitution and laws of Illinois and that since it is a principle of the common law that no one shall be twice placed in jeopardy for the same offense, the trial and commitment of one who has already been tried and acquitted of the same offense is depriving him of his liberty "without due process of law," within the meaning of the Fourteenth Amendment to the Constitution of the United States.

The law on this subject showing the jurisdiction of the federal courts is summed up in the case of *Ex parte Ulrich*, 42 Fed. 587, from which we quote (589):

> "The fifth amendment to the federal constitution provides that—
>
> "'* * * Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb. * * * etc.
>
> "It is the settled construction of this amendment that it was not designed to operate as a limitation upon the state governments in reference to their citizens, but was adopted exclusively as a restriction upon federal power. *Barron* v. *City of Baltimore*, 7 Pet. 243; *Fox* v. *Ohio*, 5 How. 434; *Twitchell* v. *Com.*, 7 Wall. 321. The fourteenth amendment declares that—
>
> "'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.'
>
> "This is an express limitation upon the powers of the state government. It opens with the suggestive declaration of the dual citizenship of all persons, native and naturalized, and then, in recognition of the maxim of free governments that the obliga-

tion of allegiance is correlative with the duty of protection, it declares that no state shall by any law abridge any of the privileges or immunities secured to the citizens of the United States, nor shall the citizen be deprived of life, liberty, or property without due process of law. What is the purport of the term 'due process of law?' Kent, in his Commentaries, says:

" 'It may be received as a proposition universally understood and acknowledged throughout this country that no person can be taken or imprisoned, or disseized of his freehold or estate, or exiled, or condemned, or deprived of life, liberty, or property, * * * unless by the law of the land. * * * The words "by the law of the land," as used originally in *Magna Charta*, in reference to this subject, are understood to mean due "process of law." * * * The better and larger definition of "due process of law" is that it means law in its regular course of administration through courts of justice.' Volume 2, p. 13.

"So the Supreme Court of the United States, in *Murray* v. *Improvement Co.*, 18 How. 272-276, speaking of this process, said:

" 'The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave congress free to make any process due process of law by its mere will. To what principles, then, are we to resort to ascertain whether this process enacted by congress is due process? To this the answer must be twofold. We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'

"As there is, confessedly, nothing in the constitution itself in conflict with the idea that the citizen cannot be twice placed in jeopardy for the same criminal offense, in following the direction of the

supreme court, we will find no principle of the common law, grounded upon the great rock of the *Magna Charta*, more firmly rooted than that no man shall be twice vexed with prosecutions for the same offense. That was as much 'the law of the land' as that he should not be tried or condemned without process of law, and the judgment of his peers. Mr. Justice Miller, in *Ex parte Lange*, 18 Wall. 163, said:

" 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. * * * The principle finds expression in more than one form in the maxims of the common law. * * * In the criminal law the same principle, more directly applicable, * * * is expressed in the Latin, "*nemo bis punitur pro eodem delicto*," or, as Coke has it, "*nemo debet bis puniri pro uno delicto.*" * * * The common law not only prohibited a second punishment for the same offense, but it went further, and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.'

"Then, quoting the language of Mills, J., in *Com.* v. *Olds*, 5 Litt. (Ky.) 137, as follows:

" 'Every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. * * * To prevent these mischiefs the ancient common law, as well as *Magna Charta* itself, provided that one acquittal or conviction should satisfy the law, or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our constitutions the clause in question.'

"And responsive to this same authority, and in recognition of the universality of the principle in question, the learned judge in *State* v. *Cooper*, 13 N. J. Law, 361, said:

"'Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. * * * And all who are conversant with courts of justice * * * must be satisfied that this great principle forms one of the strong bulwarks of liberty.'

"So the supreme court of the United States says:

"'It is contrary to the nature and genius of our government to punish an individual twice for the same offense.' *Moore* v. *People*, 14 How. 21.

"That this rule of universal justice and law owes not its origin to constitutional declarations, but was designed only to emphasize and preserve it, see *Lee* v. *State*, 26 Ark. 260; *State* v. *Snyder*, 98 Mo. 555, 11 S. W. Rep. 1036; *Ex parte Snyder*, 29 Mo. App. 261. And Cooley, in his work on Constitutional Limitations (section 36), says:

"'We must not commit the mistake of supposing that, because individual rights are guarded and protected by them (constitutions), they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed.'

"As expressive of how deeply rooted this principle of the common law has ever been in the minds and convictions of the American people, as their common, inestimable, heritage of liberty from the institutions and usages of the mother country, the colonists, long before the adoption of the constitution, incorporated the provision respecting due process of law, or the law of the land, in all their local governments; and there has not been a constitution, state or federal, adopted on this continent, which does not contain the provision against double trials and punishment, or punishment after acquittal. It is imbedded in the very bonework of our political and judicial system."

As was said by this Honorable Court in *Ex parte Lange*, 85 U. S. 163, 168:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And

though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. * * *

"Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defense."

The Supreme Court of Illinois said in *People* v. *Miner*, 144 Ill. 308, 311:

"The defendants having been arrested for a criminal offense, tried before a court of competent jurisdiction, can they, on the application of the people, be tried a second time? This is forbidden both by the common law and our constitution and cannot be done. In Wharton's American Criminal Law, vol. 1, sec. 573, after referring to the provision in the Federal constitution, to the effect that no person shall be subject for the same offense to be twice put in jeopardy, the author says: 'Whether this amounts to anything more than the common law doctrine involved in the plea of *autrefois acquit* has been much doubted. What that doctrine is has been already stated. It is founded, to adopt the summary of Chitty, upon the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation. It has, therefore, been generally agreed that where a man has once been pronounced not guilty on a valid indictment or appeal he can not afterward be indicted again upon a charge of having committed the same supposed offense. At common law, as has been seen, it means nothing more than that where there has been a final verdict either of acquittal or conviction on an adequate indictment the defendant can not a second time be placed in jeopardy.' "

There is to be found a note in 31 L. R. A. (N. S.) 603, on the right to convict for several offenses growing out of the same facts. In *In Re Nielson,* 131 U. S. 672, cited in the above note at p. 717, it was held that the conviction of a person of the crime of unlawful cohabitation was a bar to the subsequent prosecution for the crime of adultery, committed during the same period, where the adultery charged in the second indictment was an incident in part of the unlawful cohabitation for which he had been convicted.

In the *Nielsen* case this Honorable Court recognized the right of your Honors to look to the entire record, and it was held that a judgment in a criminal case denying to the prisoner a constitutional right, or inflicting an unconstitutional penalty, is void, and he may be discharged on *habeas corpus.*

We respectfully refer your Honors to our quotation from the record herein (p. 4), as to the manner in which the federal question was asserted and preserved in the trial court (Abst. 250).

We respectfully submit that if your Honors were to decide the question from the record only, the answer in favor of your petitioners would be simple and easily arrived at. Your Honors will notice that from the record it appears (Abst. 250) that petitioners offered to prove that they had been acquitted of the same charge on the same evidence. The trial court took judicial notice of its records, and we know and the trial court knew that petitioners means that petitioners contended that the charges were the same in legal effect. We respectfully inform this Honorable Court that the previous indictment charged the substantive offense which was the object of the conspiracy, and respectfully contend here, as we did in the

trial court, that the offenses were identical for the purpose of determining the question of former jeopardy.

Your Honors will note that the record shows (Abst. 258) that it contains all of the evidence offered or received at the trial and all of the proceedings.

The Appellate Court held that there was no former jeopardy and that the offer of proof was properly refused (herein p. 4). The Supreme Court in affirming the Appellate Court held that no error was committed but made no specific mention of our point on former jeopardy assigned as error.

Under the practice in Illinois, if petitioners had gone to the Appellate Court in the first instance they might have waived the constitutional questions involved. In order to properly preserve the questions here presented, as is shown by the record (R. 1), petitioners first applied to the Supreme Court for a writ of error to the trial court. The Supreme Court transferred the case to the Appellate Court and later reviewed the affirmance by that intermediate court. So we respectfully submit that the point has been preserved and here presented. Petitioners are on bond approved by the Appellate Court. A stay was granted there to enable them to proceed in the Supreme Court, and that court entered a further stay in order that this petition might be prepared and filed. We presented a petition for appeal to the Chief Justice of the Supreme Court of Illinois and were referred to this Honorable Court. Upon considering the matter further, we decided upon this petition instead.

In *United States* v. *Sall,* 116 F. (2d) 745, the defendant was convicted upon all counts in a conspiracy to violate the revenue laws. It was held that Sall could not be convicted of the substantive offense of concealing alcohol merely by proof of overt acts of other conspirators (747):

> "To hold otherwise would be to ignore the difference in character between the crime of conspiracy and the substantive crimes which may result from it and to enable the government through the use of the conspiracy dragnet to convict a conspirator of every substantive offense committed by any other member of the group even though he had no part in it or even knowledge of it. To permit this would be to open the way for the conviction of a conspirator more than once for the same conspiracy, the substantive counts, being if the government's theory is accepted in fact merely additional conspiracy counts each alleging one overt act. Where as here but one conspiracy has been shown a defendant may not thus be convicted twice of having joined it, for that would be to place him twice in jeopardy for the same offense."

The late case of *Milkwagon Drivers Union of Chicago Local 753 et al.* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, involving an industrial conflict which gives rise to anxious difficulties (299) throws some light upon the lesser problem presented by the case at bar. In the *Meadowmoor* case your Honors had the findings of fact made by the master "authenticated by the State of Illinois speaking through her Supreme Court." Your Honors said (294):

> "We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked." (Free speech as guaranteed by the Fourteenth Amendment.)

In the case at bar the trial court found against petitioners as a matter of fact and law. We respectfully submit that your Honors are not bound by this finding, as your Honors have the record and can perceive that this finding was a mistake which, in effect, deprived petitioners of constitutional rights.

This Honorable Court in the late case of *American Federation of Labor et al.* v. *Swing et al.*, 312 Ill. 321, recognized again the power of a state to regulate its local problems (325) and said that:

> "But not even these essential powers are unfettered by the requirements of the Bill of Rights."

Your Honors indicated in the *Swing* case that the scope of the Fourteenth Amendment is not confined by the motion of a particular state regarding common law policy whether the limits imposed are defined by statute or by the judicial organ of the state.

In *Lisenba* v. *California* (opinion December 8, 1941) this Honorable Court dismissed several contentions of counsel as not tenable under the Fourteenth Amendment, but held in considering the constitutional question involved, where the claim is that a confession was obtained by illegal means, your Honors are bound to make an independent examination of the record to determine the validity of the claim. Your Honors said (290):

> "The Fourteenth Amendment leaves California free to adopt, by statute or decision and to enforce such rule as she elects, whether it conform to that applied in federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of the rule works a deprivation of the prisoner's life or liberty without due process of law.
>
> * * * * *
>
> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

As was said in *Norris* v. *Alabama*, 294 U. S. 587, whenever a conclusion of law of a state court as to a federal right is so intermingled with findings of fact that the latter control the former, it is incumbent upon

this Court to analyze the facts in order that the enforcement of the federal right may be assured.

> "Citation of authority for the same principle might be multiplied indefinitely." (*Gt. Northern Ry.* v. *Washington*, 300 U. S. 154, 167.)

As was said in *Chapman* v. *Goodnow*, 123 U. S. 540, 548:

> "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

And in *Honeyman* v. *Hanan*, 300 U. S. 14, 18:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54, and cases there cited. Whether these requirements have been met is itself a federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record."

B.

Although we realize that this Honorable Court would not assume jurisdiction to merely review the evidence and examine the merits, we are led to believe that in some cases where jurisdiction is assumed on other grounds

your Honors will look to the evidence to determine, if necessary, the extent of the injury done by the errors below. Petitioners respectfully claim that the evidence is not sufficient to sustain the verdict. We shall not extend this petition with a discussion of the facts. Argument upon this point will be deferred until briefs are filed, if permitted. Suffice it to say that Parker respectfully claims now that about the only evidence against him was furnished by Van Bever (Abst. 7), a disbarred lawyer in the pay of the complainant, the American Express Company, as a detective or undercover man pretending to operate with the guilty persons. Moran claims that his conviction rests principally upon the testimony of accomplices who were discredited and who received consideration and immunity from the State.

C.

Further Errors Committed.

We shall also make mention of further errors which, we respectfully submit, contributed to the improper verdict and judgment, and upon which errors we hope to be permitted further argument. The record shows that the defendants Sexton and Keller were acquitted at the trial. Appellants were not claimed to have been present when the substantive crimes were committed; they were prosecuted upon the theory that they were accessories. It is respectfully submitted that where a criminal act is committed through the instrumentality of an innocent agent the person who induced the act is a principal although not present when the act was committed, but one cannot be convicted of an accessory before the fact where the parties who actually took the property and disposed of it have been found not guilty and there is no proof that the property ever came into the defendant's possession, as there can be no accessory without a guilty principal (*People* v. *Walker*, 361 Ill. 482).

D.

Also we respectfully contend that the trial court erred in rulings concerning the evidence, placing an undue limitation upon the defense in cross-examination and erred in the matter of giving and refusing instructions.

E.

CONCLUSION.

We respectfully pray that the writ issue in order that we may be permitted under the rules to show the extent and nature of the errors committed and to demonstrate further that petitioners have not been accorded a trial in accordance with the law of the land in keeping with the decisions of this Honorable Court.

As was said by Mr. Justice Holmes dissenting in *Lochner* v. *New York*, 198 U. S. 45, 76:

> "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."

We respectfully submit that if your Honors decide this application on the bare record of the fact that petitioners offered to prove that they had been previously acquitted of the identical offense, the violation of federal rights is clear. If your Honors accept our statement that the indictments were different, general propositions may be found in the books appearing to support the state court, but we respectfully submit that when the questions presented are fully studied double jeopardy, such as has been prohibited, exists.

Respectfully submitted,

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Counsel for Petitioners.